IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6480 OF 2006

Balu Natha Repe ..Petitioner.
Vs.
Smt. Kamalaben Natha Repe
(deceased by her heirs)
1. Smt. Yesabai w/o Ramchandra
Nethe and Ors. ..Respondents.

Mr.P.S.Dani, adv. for the Petitioner.
Mr.V.B.Rajure, adv. for the Respondents.

CORAM : J.H.BHATIA, J.
DATE : SEPTEMBER 7, 2007.

P.C.:

1. Heard the learned counsel for the Parties.

2. To state in brief, one Kamala wife of Natha Repe was the owner of the suit property. The property had come to her through her parents side. The present petitioner, who claims to have been adopted as son of the deceased Natha Repe took over possession of the property. Kamala filed Regular Civil Suit No.97 of 1973 against the present petitioner seeking possession of the property. She denied that the present petitioner was her adopted son. The suit was decreed in favour of Kamala and against the present petitioner. The trial Court had given a finding that the suit property was exclusive property of Kamala, which had come to her through her parents' side. The Court also

held that the present petitioner was adopted son of her husband Natha. Against that decree, the present petitioner filed an appeal no.211 of 1977. The appeal was dismissed. He also preferred Second Appeal No.52 of 1997, which was also dismissed. Pending the first appeal, Kamala died and her daughters were brought on record as legal heirs. After dismissal of the second appeal, the daughters as legal representatives of the deceased/plaintiff filed execution petition no.299 of 2005 for execution of the decree. In that petition, the present petitioner contended that he, being the adopted son of the husband of Kamala, is entitled to share in the property and as such has become joint decree holder after the death of Kamala. He contended that as he is in possession of the property, decree can not be executed against him and the daughters of Kamala may file a suit for partition and possession. This application was opposed and the learned executing Court observed that the deceased/plaintiff or her husband had never relinquished any share in the property in favour of the judgment debtor i.e., the petitioner, therefore, the judgment debtor can not insist that the decree holders should file a suit for partition against him. Being aggrieved by the rejection of his objection, petitioner has preferred the present petition.

3. The learned counsel for the petitioner contended

that after the death of Kamala, the petitioner is entitled to share in her property and as such, he has become the joint decree holder and as he is in possession of the property, he can not be dispossessed nor the decree can be executed against him. According to him, because the shares are not determined, the daughters of Kamala will have to file a suit for partition and get possession. In support of his contention that when a joint decree holder is in possession, the other joint decree holders can not execute the decree against him and will have to file a suit for partition, the learned counsel relied upon **Jagdish Dutt and another v. Dharam Pal and others AIR 1999 Supreme Court 1694**. However, it should be noted that the present petitioner has filed Civil Suit No.639 of 2005 seeking a declaration that the decree passed in regular civil suit no.97 of 1973 is not binding on him and that he is exclusive owner of the property. By this conduct of the petitioner, he has declared that he does not claim to be joint owner of the property or the joint decree holder. Even after the death of Kamala, he still claims to be exclusive owner of the property. This claim has been already rejected in the suit no.97 of 1973 filed by Kamala. In view of his claim in suit no.639 of 2005, it is clear that he does not claim the property as a joint decree holder but seeks to set aside that decree. In the execution petition, he

claims that he is a joint decree holder and the other side should file a suit for partition while on the other hand, he himself files a suit claiming a declaration that the said decree is not binding on him. It is material to note that the petitioner was in illegal possession even during the lifetime of Kamala and specifically since prior to 1973. During the lifetime of Kamala, he had no right over the said property and thus, was in unauthorised occupation. After the death of Kamala for the last about 30 years or so he has deprived daughters of Kamala, her legal heirs, from possession of the property. In these circumstances, the contention of the petitioner that the execution petition can not proceed against him can not be accepted. It will not be appropriate for this Court to interfere in the writ jurisdiction under the Article 227 of the Constitution of India as it may amount to rendering assistance to a person, who is in unauthorised occupation for such a long period and, who does not have any intention to give the property to the legal heirs of the deceased.

4. The petition stands dismissed with cost of Rs.5,000/- to be paid to the respondents.

[J.H.BHATIA, J.]